

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARCUS TAYLOR,

Plaintiff,

File No. 1:10-CV-94

v.

HON. ROBERT HOLMES BELL

CAROL HOWES, et al.,

Defendants.

**ORDER APPROVING AND ADOPTING IN PART
MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION**

On October 26, 2010, United States Magistrate Judge Joseph G. Scoville issued a report and recommendation (“R&R”) recommending that Plaintiff’s claims against “Lieutenant Unknown Nocliaga, L.C.F.,” “Unknown Medical Practitioner, L.C.F.,” and “Unknown Physician’s Assistant, L.C.F.,” be dismissed without prejudice under Rule 4(m) of the Federal Rules of Civil Procedure, and that Plaintiff’s claims against Defendants Warden Carol Howes and Donna J. Croston, R.N., be dismissed for failure to state a claim on which relief can be granted. (Dkt. No. 36.) After receiving an extension of time (Dkt. No. 42), Plaintiff timely filed his objections on December 2, 2010 (Dkt. No. 47). Plaintiff also timely filed a proposed amended complaint (Dkt. No. 54) in support of his motion to amend (Dkt. No. 44), pursuant to leave granted by the Magistrate Judge (Dkt. No. 50).

This Court is required to make a *de novo* determination of those portions of the R&R to which specific objection has been made, and may accept, reject, or modify any or all of the Magistrate Judge's findings or recommendations. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

Plaintiff objects to dismissal pursuant to Rule 4(m). Plaintiff contends that his identification of the defendants by their work titles (medical practitioner, physician's assistant, lieutenant) should have been sufficient for service because there was only one individual at the facility meeting each of those descriptions. Plaintiff filed a motion requesting the Michigan Department of Corrections to produce names, but it was denied for failure to comply with the prerequisites for filing a motion to compel against a non-party. (Dkt. Nos. 14, 18). On November 29, 2010, Plaintiff filed a motion to amend his complaint to correct/complete the names of the "unknown" defendants. Attached to the motion is a copy of a November 8, 2010, letter from defense counsel with the names of individuals who matched Plaintiff's descriptions. (Dkt. No. 45, Ex. A.) Plaintiff has now filed a proposed amended complaint that names the individuals he previously described only by title. (Dkt. No. 54.)

Rule 4(m) requires the court to dismiss the action against a defendant who is not served within 120 days after the complaint is filed. Fed. R. Civ. P. 4(m). However, Rule 4(m) further provides that "if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." Fed. R. Civ. P. 4(m). Plaintiff has

shown diligence in his attempts to name the “unknown” defendants, and has filed a proposed amended complaint naming the “unknown” defendants. The Court will not consider the recommendation to dismiss the “unknown” parties until the Magistrate Judge has had an opportunity to rule on Plaintiff’s motion to amend.

Plaintiff has not filed a specific objection to the Magistrate Judge’s determination that he failed to state a claim against named Defendants Howes and Croston. Plaintiff’s proposed amended complaint, like his original complaint, is similarly devoid of factual allegations against Defendants Howes and Croston. The Court agrees that Plaintiff has failed to state a claim against these two Defendants. Accordingly,

IT IS HEREBY ORDERED that the October 26, 2010, R&R (Dkt. No. 36) is **APPROVED and ADOPTED IN PART** as the opinion of the Court. The Court adopts the R&R’s recommendation that the claims against Defendants Howes and Croston be dismissed, but takes the recommendation to dismiss the unknown defendants under advisement.

IT IS FURTHER ORDERED that Defendants Howes and Croston’s motion to dismiss (Dkt. No. 28) is **GRANTED**.

IT IS FURTHER ORDERED that all claims against Defendants Howes and Croston are **DISMISSED** for failure to state a claim on which relief can be granted.

Dated: February 4, 2011

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE